

# The Rise of a Dissuasive Democracy in France

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On November 24, 2020 the French National Assembly [adopted](#) the Global Security Act (GSA, [loi relative à la sécurité globale](#)) by a wide margin (388 for, 104 cons). The bill entrenches the cooperation between public and private security forces, broadly regulates the use of surveillance drones, and strengthens the legal protection offered to security officers identified on videos that circulate on social media. To meet the latter purpose, lawmakers introduced a heavily contested article 24 that punishes “by one year of imprisonment and a 45,000 euro fine the fact of diffusing, by whatever means and whatever the medium, for the purpose of harming the physical or mental integrity, the image of the face or any other element of identification of a national police officer or a military of the national gendarmerie when acting in the course of a police operation”. Critics, among which the [UN Human Rights Commissioner](#), the [Defender of Rights](#) but also lawyers and journalists, argue that the bill violates freedom of speech and the press. After a wave of [protests](#) and questioned by the opposition, Prime Minister Jean Castex reaffirmed the commitment of his government to civil liberties and announced that he would refer this “excellent” bill, that the Senate has yet to adopt, to the [Constitutional Council](#) over article 24 before its promulgation.

The GSA is part of a broader context marked by new challenges posed to freedom of expression and information in times of unlimited access to data by law enforcement (drones, cctv) and their inevitable dissemination through social media by the public. France, like other democracies, engages in the hard work of balancing human rights and security measures. Yet, lawmakers add to the legislative inflation with ill-designed security laws.

This bill does not merely attempt to silence the press, but to contain the use of social media. In order to reach this goal, it tramples on freedom of expression and sets yet another stone for a dissuasive democracy in France.

## Targeting social media and chilling freedom of the press

The Minister of the Interior Gérald Darmanin made two important and related remarks on November 2, 2020, which highlight the very nature of the bill. First, unsurprisingly, the private member’s bill was in fact drafted in close collaboration with the executive. Second, correlatively, art. 24 delivers on the promise of Mr. Darmanin “that it would no longer be possible to diffuse images of police officers on social media”. In fact, art. 24 aims at criminalizing cybermobs of security officers

that could arguably result in the disclosure of personal details (such as family name, home address) and to hardly traceable death threats on social media.

Although the purpose is unanimously supported across the bench, the method raises serious concerns regarding the chilling effect on the press. Indeed, instead of adapting the Criminal Code, the bill amends the 1881 *Freedom of the Press Act* that regulates freedom of the press but also freedom of speech, and which applies to internet service providers as confirmed by the [Council of State](#) in late 1997. Lawmakers justify this move because while the 1881 Act already prohibits the publication of police officers' identity, it does so under restrictive procedural conditions that limit the risk of sanction. Therefore, in practice, art. 24 could allow immediate arrest, placement in custody, and up to a year in prison of individuals regardless of their title or profession on the sole basis of filming a police operation. Journalists are concerned that their material could be preventively confiscated and the footage erased because police officers do not need to be certain nor prove the intention to harm his physical or mental integrity.

Then, a unique option remains open for journalists and the public: blurring security officers' faces and identifiers. Although the Minister denied such precondition, it is expressly mentioned in the [report](#) introducing the bill (p.110). This would prove technically difficult in real time and would constitute both an undue burden and a prior restraint on freedom of expression and the press.

## Manifestly unconstitutional

If adopted, the bill could be struck down by the [Constitutional council](#) on many grounds. First, the language used is vague. The title of the act itself, "Global Security", is unclear and troubling. Lawmakers didn't clarify the meaning of "police operation" and "mental integrity". The latter requires psychological expertise to assess the harm. Moreover, it will be hard to prove the harmful intent of the individual sharing of a footage on social media. Thus, article 24 has nothing to do with immediate incitement to violence or threats which are severely punished under criminal law (433-3, Criminal code) but with the publication of harsh criticism towards the police. Indeed, the Minister explained at the National Assembly that the Criminal Code didn't sanction hateful campaigns against the police.

Second, the bill doesn't meet the proportionality test as applied by the Constitutional Council (131 QPC, 20 May 2011). By criminalizing the dissemination of images related to police operations at a time when smartphones and social media are important means of expression and participation to public conversation (see, ECHR, *Ahmet Yildirim v. Turkey*, 18/12/2012, §54), Parliament manifestly violates freedom of expression and opinion under article 11 of the 1789 Declaration of Human Rights. Art 10-2 does allow for restrictions of that right to protect national security and public safety, but the Court repeatedly insisted that such limitations must prove "necessary in a democratic society". As a consequence, imposing, suggesting or compelling to blur police officers constitutes a burden incompatible with a democratic society.

From another standpoint, the GSA results in the exercise of a substantial public control over press organizations because it captures the editorial control over police operations. The decision to film, blur, and broadcast or live stream will be tied to the government agenda and no longer to the interest of the public. Thus, the bill is incompatible with the objective of the constitutional value of pluralism identified by the Constitutional Council in a 1984 [decision](#). Indeed, it is not enough for pluralism to have different organizations operating. It might be satisfying on the surface but it is not sufficient. Pluralism requires editorial control. The Constitutional council ruled that the Parliament must [fully exercise its authority](#) to protect freedom of expression and the press. As the GSA undermines these liberties, it could be struck down on this ground.

The current bill poses a dangerous equation in which police operations require a total opacity and absence of information. However, as Patrick Wachsmann wrote, “information are essential (...) to alert citizens about threats posed to liberties” (*Libertés publiques*, LGDJ). By chilling speech and the press, lawmakers dissuades democratic control and clears the path to abuses.

## Attribution, not defamation

One question remains central: is it legitimate and in the public interest to identify police officers in the first place?

According to the government, the answer is no. Identifying police officers or security forces indicates an intention to harm. However, it is not only in the public interest but, what is more, also a legal requirement to attribute a behavior to his author. It is the first condition of accountability. Knowing who does what prevents defamation, and preserves public confidence by isolating malpractice to a single individual. Alexandre Benalla, a former security guard of Emmanuel Macron during the 2017 campaign, was identified and prosecuted because he illegally usurped the police bandwidth and [molested](#) protesters in 2018.

Under art 24 of the GSA, a police officer could allege that it is a risk for her mental integrity to be recorded while she arrests an individual. The risk of sanction might cause anxiety, reputational damage or fear of sanction. However, accountability which could lead to disciplinary sanctions or even criminal liability is perfectly legitimate for the public to expect. Further, identifying officers helps journalists and the public to report accurate information in good faith, thus preserving them from defamation lawsuits (ECHR, *Fressoz and Roire v. France*, 1999).

On the opposite, a duty to blur or look away would dangerously fuel the anti-police sentiment both the executive and legislative branches fight against. Dissuading reporting favors the emergence of conspiracy theories which will arise out of the opacity of police operations. It would also deepen the relational and informational asymmetry between security forces and citizens, with the voice of the first often privileged over that of the second due to the exercise of authority.

MPs from both sides of the political spectrum proposed to either get rid of art 24 entirely or to rewrite it in order to preserve a free press or to prohibit police officers from preventing video recordings of an operation. But despite warnings from the leader of the majority and former Minister of the Interior Christophe Castaner, and the current Minister of Justice Eric Dupond Moretti, the government didn't move an iota. Later this week, the Prime Minister offered to set up a committee to rewrite art 24, but [removed](#) it after speakers of both houses and MPs criticized a breach of the Parliament's legislative powers.

## From Liberal to Dissuasive Democracy

The GSA is a perfect illustration of what I call a *dissuasive democracy*, meaning a regime where civil liberties are facially guaranteed by the constitution, but where laws and regulations are designed to dissuade individuals from exercising their civil liberties. This restraint might be caused by fear from physical harm or criminal sanctions. In any case, the laws and regulations shift the balance towards abstention, rather than action. Art 24 is yet another step in this [process](#).

In 2018, the 'yellow vests' movements sparked and gained traction exponentially both in terms of participation and among the public. But week after week, police interventions gradually turned more repressive. As a result, 11 people died, 1700 were injured, 25 became permanently blinded, and 5 people lost a hand due to dispersal grenades. [Jérôme Rodrigues](#), a key figure of the yellow vests, lost an eye while he was filming the police and streaming it on social media.

As a result, the protest slowly eroded and the government considered the public did no longer support the movement. The risk of injuries or arrest was an invitation to stay home.

In march 2020, while the pandemic was [surging](#), the government decided to [hold](#) the first round of local elections despite calls to postpone the vote to avoid infection. In the weeks following the election, many voters and poll watchers turned out to have indeed [infected](#) and some mayors [died](#).

The GSA follows that trend by extending the chilling effect to the press and social media where images of police brutality keep being posted, despite the government's efforts to deny its very existence. The rhetoric used by Gérald Darmanin was particularly revealing of the current climate of denial in France. "When I hear the word 'police violence', I choke", commented the Minister who cannot ignore that suffocation killed [Cedric Chouviat](#) and George Floyd. In January 2020, Mr. Chouviat was filming a police intervention in Paris. He was placed on the ground and although he repeated on seven occasions "I can't breathe", the police didn't stop. He died soon after.

Finally, the Parliament recently adopted the [research programming bill for 2021-2027](#) which punishes of one year in prison and a 7500 euros fine the act of "entering or remaining [within universities] for the purpose of disturbing the peace or good order". This bill marks an unprecedented violation of academic freedom and free speech on

campuses. It is [unanimously](#) condemned by [academics](#) across the country appalled by the government's scheme to [dismantle](#) universities.

The French government is determined to tighten security at all levels of society at the expense of civil liberties. Containment of images as well as dissuasion of the press, academics and the public are useless and dangerous. Democracy can't breathe off-air.

*A previous version of this article has omitted to mention that the Senate still has to confirm the bill. That has been corrected.*

